UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

PARATRANSIT SERVICES, INC.
Respondent

and **Case 20-CA-110937**

TEAMSTERS LOCAL 665
Charging Party

Cecily Vix, Esq., and David B. Reeves, Esq., for the General Counsel.
Christopher L. Hilgenfeld, Esq., for the Respondent.
Sheila K. Sexton, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

Dickie Montemayor, Administrative Law Judge. This case was tried before me on June 12-13, 2014, in Lakeport, California. Charging Party (Union) filed a charge on August 7, 2013, alleging violations by Paratransit Services Inc., (Respondent) of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended (the Act). Respondent filed an answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, and based upon the detailed findings and analysis below, I conclude that the Respondent violated the Act essentially as alleged.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, Respondent admits, and I find that:

1. (a) At all material times, Respondent has been a corporation with a place of business in Lower Lake, California (Respondent's facility), and has been engaged in the business of operating a transportation service for customers with special needs.

(b) In conducting its operations during the 12-month period ending December 31, 2013, Respondent purchased and received at Respondent's facility goods valued in excess of $5000 directly from points outside the State of California.

(c) In conducting its operations during the 12-month period ending December 31, 2013, Respondent derived gross revenues in excess of $250,000.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

(a) William Randy Grove-Director of Operations and Human Resources and

(b) Wanda Gray-General Manager.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Paratransit Services, Inc. is a non-profit company that provides transportation services pursuant to a contract with Lake Transit Authority in Lake County, California. The contract between Respondent and Lake County first became effective in 2007. Since 2007, the employees have been represented by Teamsters Local 624 which later merged with Teamsters Local 665. The Union's bargaining unit consists of:

> …all full-time and regular part-time vehicle drivers, mechanics, and utility workers employed by the Company at its Lower Lake, CA facility excluding all other employees, managerial employees, seasonal employees, office clerical employees, confidential employees, seasonal employees, casual employees, guards, and supervisors as defined by the Act as certified by the National Labor Relations Board on May 31, 2006.

The unit consists of approximately 43 employees. There are six employees who are not in the bargaining unit, two operations supervisors, a mechanics supervisor, and two part-time administrative assistants.

B. The Expired Contract and the 2-Day Strike

The labor agreement between the Union and Respondent expired on June 30, 2013. (GC Exh. 2). The parties began bargaining for a successor agreement on April 30, 2013. The lead negotiator for the Union was the Union President Ralph Miranda. The lead negotiator for the Respondent was William "Randy" Grove. On June 23, 2013, the Union notified Respondent that a 2-day strike would take place. The strike occurred on July 1 and 2, 2013. During the duration of the 2-day strike, Respondent remained operational and any employee who desired to work was allowed to do so.

Seven unit employees crossed the picket line and worked. They were Mike Sprague, Ken Cowden, Alta Cowden, Jonathan Reid, Rachael Hinojosa, Destini Lehmann, and Rick Wedell. Of these employees, Lehmann, Wedell, and Reid were newly hired and were participating in training. The expired agreement contained a union-security clause which required union membership after 30 days of employment and contained a checkoff provision which authorized payroll to deduct union dues. Wedell although a new hire was already a member of Teamsters Local 315 and therefore requested and was given specific permission by the Union to cross the picket line because he was in training. At the time of the strike, he had not yet become a member of Local 665. Lehman had signed a dues authorization but also had not yet become a union member. Dante DeAmicis was also a newly hired employee but did not cross the picket line. As of July 1, 2013, he had not yet become a union member.

The 2-day strike was intended to put pressure on Respondent to resolve the differences between the parties that existed during bargaining. After the 2-day strike ended bargaining continued but no agreement was reached.

C. The Indefinite Strike

On July 25, 2013, The Union President, Ralph Miranda notified Respondent, via email, of the Union's intention to call a strike effective at 12 midnight, Monday, July 29, 2013. The following day, on Friday, July 26, 2013, Respondent placed in the employee mail boxes, a 3-page document which purported to inform them of their right to work during the strike. The document also informed them that if they were members of the Union and crossed the picket line they could be fined by the Union. The memorandum provided in pertinent part:

> We have received questions regarding this matter from employees. The following information is being provided in response to those questions. Paratransit Services has an obligation to continue to provide transportation services to the citizens of Lake County. It is our intent to make every effort to continue to meet that obligation. In the event of an economic action or strike, Paratransit Services will be hiring workers in order to continue to provide services to Lake County. If you wish to abandon the strike, and a vacancy exists for you, you may cross a picket line to work for us. Paratransit recognizes that it is your choice whether or not to

> strike or work behind a picket line. We will respect whatever decision you make. If you decide to cross the picket line and work for us, you could be subject to a fine or other penalty by your Union—if you are still a member of the Union. To protect against a fine or penalty, you would need to resign (not withdraw) from the Union. If you choose to resign from the Union, the change in status becomes effective when it is received by the Union. We have attached a sample form for your use should you decide to do so. The choice is yours. We are not recommending for or against any of the above matters. We simply want you to know what your options are." (GC Exh. 8.)

The sample resignation form was presented in a fax cover sheet format and contained the following language:

> I am an employee of Paratransit Services—Lake County, CA. This letter serves as notification that I am resigning my membership status in the Union, effective immediately. I understand that this notice becomes effective upon receipt by the Union. (GC Exh. 8.).

The 3rd page of the memorandum was constructed in a question and answer format and contained the following questions and answers:

> This information is provided in response to questions that have been posed and is for general informational purposes only. This information should not be construed as legal advice or advocating any particular position or course of action.
>
> Question: What if I want to work during a strike?
>
> Answer: If you want to work during a strike you must be certain that you are not a union member if you wish to avoid union fines. (See below) Should you work during the strike? That is a personal decision. You have a right to strike as well as a right not to strike. If the employer continues to operate during the strike, you need to decide what to do based on your own needs. Don't let anyone coerce you one way or the other.
>
> Question: Can the union fine you if you work during the strike?
>
> Answer: Probably—unless you resign from membership before going back to work.
>
> Question: Should you resign from membership if you work during the strike?
>
> Answer: Once you resign and are a nonmember you are not subject to a union's constitution and bylaws and cannot be fined.
>
> Question: When should I resign?

Answer: Before you actually perform work during a strike. If you resign before a vote is conducted you will lose your eligibility to vote.

Question: Can the union constitution prohibit you from resigning during the strike?

Answer: No. The federal courts are unanimous.

Question: Can the union force an employer to fire an employee who decides to resign from the union and work during a strike?

Answer: No.

Question: How do you resign?

Answer: By faxing a resignation letter to the union (707–542–1501) stating you are resigning from the union. The resignation can be sent by fax and the fax confirmation slip retained for proof of having faxed. A sample resignation letter is attached for informational purposes. (GC Exh. 8).[1]

D. Dante DeAmicis' Encounter With Randy Grove

The strike commenced at 12:01 a.m. on Monday, July 29, 2013. Paratransit had not contracted any security for the strike so Randy Grove, the director of operations and human resources arrived at the facility at approximately 3:45 a.m. to cover any lapse in security. He sat in his vehicle with his lights off concealed between bushes. Sometime between 3:45 and 4 a.m., he noticed a bicyclist circling the building riding slowly looking in the windows. Because the facility wasn't scheduled to open until 5 a.m., Grove was concerned the person shouldn't be there and exited his car shining the flashlight on the person and asked, "can I help you?" (Tr. 160.).

The person on the bicycle was Dante DeAmicis. DeAmicis identified himself as an employee and advised that he worked there, that he was scheduled to work that morning and asked if the doors were locked. DeAmicis had not been notified of any schedule change and arrived early to work. Because he knew the strike was scheduled to begin that day, he assumed there would be a picket line at the facility and in order to bypass the picket line he decided to arrive at 4 a.m. and planned to drink coffee and wait around the facility until his shift started.

Grove was suspicious of DeAmicis and called Wanda Gray to check his story. Wanda Gray confirmed to Grove that DeAmicis was in fact an employee and relayed information to DeAmicis through Grove. DeAmicis was advised that despite the fact that he arrived at the facility to work and was willing to wait around until his shift started,

[1] The General Counsel made clear that it does not contend that the documents Respondent placed in employee's mailboxes nor the issuance of the documents to the employees violated the Act. (GC Br. at p. 4 fn. 6.)

there was a reduced schedule due to the strike. He was advised the he was not on the drivers list and he would have to could come back at 8 a.m. and then Grey would have some work for him. He was then told that if he couldn't show proof that he resigned from the Union he would have to leave the property. (Tr. 80.). DeAmicis told Grove that he couldn't resign from the union because he never joined the Union. Grove then questioned him asking, "weren't you at the strike meeting yesterday" to which DeAmicis replied "no I was shoveling goat manure." (Tr. 80:15–24.). Grove responded by saying, "well at least you were doing something productive." (Tr. 80–81.).

DeAmicis left and did not show up at 8 a.m. He was confused and thought that he was missing something from the relayed conversation because he was not a union member. He thought there was something he had to do first because he would not be able to show proof that he resigned from the Union he had never joined. On July 29, 2014, at approximately 5 p.m., he called the office and spoke with Wanda Gray. He asked her if she had work for him and she said, "you have been told what you need to do if you want to work." (Tr. 83:8.) He responded that he didn't think so because all he received were forms relating to union members. She repeated the same thing over again stating that, "he had been told what he needed to do if he wanted to work." (Tr. 83.).[2] He ended the conversation by acknowledging that maybe he missed something and would again review the forms he received.

The next day, after again reviewing the documents provided by Respondent, DeAmicis sent Randy Grove an email and copied Wanda Gray and others on the email. The subject line of the email contained the question, "Should I consider myself locked out?" (GC Exh. 10.). In the email, he referenced the phone conversation he had with Wanda Gray on July 29, 2014. The email stated:

> After my July 29th phone conversation with Operations Manager Wanda Gray on the first day of the strike, I reviewed the three recent documents I received in my mail box from Paratransit Services. I assume she referred to the July 26th "Labor Dispute Rights (Strike)" document. Pages one and three exclusively refer to unions, union membership, and resigning from the union. There is no mention of how a strike affects employees who were never members of Teamsters Local 665 to begin with. Page two is a "sample resignation form" from this union although no variation of this form appears to be acceptable to management. Nothing on this form reveals any reason why a non union member should be sending this letter of resignation to the union in order to work. I wrote up my experience on the first day of the strike as a non union member, showing up for work as scheduled, and being asked to leave unless I showed evidence that I resigned from a union that I had never joined. Since this requirement is patently irrational the effect is the same as being locked out. The Operations Manager stated recent trainees had filled out this form. Tuesday, July 30th, I located fellow trainee "Destini" driving a bus, who

[2] It is unclear from the record when, but at some point in time Gray told DeAmicis that the form was "supposed to let the Union know that [he] intended to cross the picket line." (GC Exh. 10.).

> admitted she felt awkward filling out this form which did not apply to her situation either. Wanda Gray further instructed me that this form was supposed to let the Union know I intended to cross the picket line. If this is all Paratansit wants and the form is indeed a sample letter, then I have no objection to informing Ralph Miranda, President of Local 665, directly of that fact while deleting the false premise of me being a union member. My alternative to the "sample form would keep everything the same except changing the middle sentence to: "This letter serves as notification that I am not presently a Union member and that I intend to cross the picket line during the current labor dispute." (new text in bold) I agree to follow the instructions on keeping copies of the original and FAX confirmation. Is this variation of the sample acceptable? At present, the only party that is keeping me from crossing the picket line and driving a bus is Paratransit Services. (GC Exh. 10.).

On August 1, 2013, DeAmicis sent another email to Randy Grove which contained "Confirmation of transit employee lockout" in the subject line and stated, "I may not be a Paratransit Service employee much longer but that will not prevent me from continuing to comment on this highly contentious issue." (GC Exh. 11.). Attached to the email was a document that stated in pertinent part:

> As of this writing I have not received a response to my offer to send the corrected Paratransit Services sample form to Ralph Miranda as a condition to resume driving a bus. I never really left. I just had my schedule canceled. This is peculiar considering how motivated Paratransit is right now to put qualified drivers behind the wheel. Without two way communication between us I have no alternative but to file for unemployment benefits first thing Friday morning, I will also be submitting: 1) This notice, 2) My written account of arriving for work July 29, 3) My Tuesday update with form revision offer, and 4) Paratransit's "sample" form. If you would like to contact me before then with a schedule offer I can be reached by phone and I will be checking my e-mail. (GC Ex. 11).

On August 2, 2013, Randy Grove responded to the two emails. In his response he stated:

> This email responds to your recent inquires about your status. You are not locked out. On July 29, you were informed that if you wanted to return to work, you should report back to work at 8:00 am. As you know, the Union has been engaged in an economic strike against the company that began on that same day. We have had to make many changes in operations because of that event. You have chosen not to return to work so far, so we conclude that you have joined the strike and are withholding your services. If you want to cross the picket line and return to work while the strike is going on, you should refer to the materials we have previously distributed to you which explains how best to pursue this option. (GC Exh. 12.).

On August 4, 2013, DeAmicis sent a third email reiterating his concerns. He questioned whether he might not have received documents that were intended for nonunion employees and advised that he had applied for unemployment benefits. He ended the email by stating, "if there has been a glitch in communication please let me know soon. As always, I will accept any schedule." (GC Exh. 13.). Neither Grove nor Gray, who was also copied on the email, responded to this final email.

It is important to note that both DeAmicis and Grove's testimony are very similar to each other regarding some of the basic facts of their early morning encounter. Not surprisingly, their versions diverge when it comes to the question of whether DeAmicis was told of the requirement to resign from the Union and similarly, whether he was questioned about attending the union strike meeting. I am mindful of the challenges presented in resolving credibility issues raised by conflicting versions of events between two parties who were alone and they themselves were the only witnesses to the conversations. In resolving the credibility issues, in addition to candor and demeanor, I have paid particular and careful attention to the logical consistency of the evidence as well as the sequence of events. After carefully considering the matter, I credit DeAmicis' testimony and find that in the retelling of events, Grove selectively left out important parts of his encounter with DeAmicis. Viewing the totality of the evidence and testimony, I find DeAmicis' version of events to be consistent with what transpired in the days following the encounter with Grove. The very existence of the written record in the form of emails and the content of the emails i.e. the repeated reference to resignation from the Union as a condition of employment lends credibility to his version of events.

E. Wanda Gray's Telephone Calls to Rick Wedell

Rick Wedell was a driver who had been recently hired. During the first strike, he crossed the picket line. After he completed the training, he was assigned duties as a driver and drove for two days prior to the start of the second strike. On Friday July 26, 2013, Wanda Gray called him on his cell phone advised him of the strike to take place beginning on the following Monday and asked if she could call on him to work that day. (Tr. 129.). She then advised him that he would have to "fill out a form to resign from the Union to be able to come in." (Tr. 129.). He told her it was "a weird situation" and he didn't know what he would do. (Tr. 130.) She told him that she would respect his decision one way or another but he would have to sign the form. She then advised that she would call him back on Sunday. On Sunday she left a voicemail for him essentially reiterating what she had previously told him. (Tr. 132.). He did not return her call nor did he report for work on July 29, 2013.

Gray denies that she ever told Wedell of the requirement to resign from the Union. I credit the testimony of Wedell as being truthful and accurate. I credit Wedell's testimony not only because his demeanor and candid testimony at the hearing suggested that he was being truthful but also because it is consistent with what other employees were told. Not only was DeAmicis told he had to resign as outlined above but another employee was also told the same thing.

Alta Cowden and her husband Ken Cowden both were employed by Respondent during the strike. Both submitted letters of resignation and worked during the strike.[3] Alta Cowden gave an affidavit to Board Agent Richard McPalmer in the case. Referring to a conversation between Gray and Cowden, Board Agent McPalmer typed, "I recall asking whether we had the memo and the form but she didn't say anything more." Cowden in her own handwriting corrected the Board Agent's typewritten sentence to read, "I recall being asked whether we had the memo and the form and **she said she needed to see them for us to work** (emphasis added)." (GC Exh. 14.). She specifically testified that the "form" referred to the sample resignation form that was included in the July 26, 2013 memo that was placed in employees mailboxes. (Tr. 300: 17.).

Cowden's correction appears to be an honest and truthful attempt on her part to correct the Board Agent's inaccuracy. This correction contradicts and weighs heavily against Gray's assertions. I find that the pen and ink corrections made by Cowden, on her own initiative, and in her own handwriting, to be strong and compelling evidence supporting the conclusion that not only were Wedell and DeAmicis told of the requirement to submit a resignation form in order to work but Cowden was told the same thing. As will be discussed in more detail below, Cowden's affidavit is also consistent with Respondent's own admission that they in fact collected resignation forms.

F. Analysis

i) Respondent's Multiple Violations of the Act

a) Conditioning Work on Resignation from the Union.

Section 8(a) (1) forbids employers from "interfering with restraining or coercing employees in the exercise of the rights guaranteed in Section 7." 29 U.S.C. Section 158(a)(1). An employer does not violate the act by merely providing resignation information to employees. See *R.L. White Co*., 262 NLRB 575 (1986). However, when as in this case, the employer conditions employment on resignation it unmistakably crosses the line. The facts as outlined above make clear that Respondent violated the Act when it required that both DeAmicis and Wedell resign and provide proof of the resignation prior to being allowed to work. The Board has long held, that this type of conduct violates the Act. See *Triumph Curing Center, Inc*., 222 NLRB 627 (1976), wherein the Board addressed the very issue presented finding a violation. See also, *Manhattan Hospital*, 280 NLRB 113 (1986); *Chicago Beef Co*., 298 NLRB 1039 (1990); *F.L. Thorpe & Co*., 315 NLRB 147 (1994); and, *Gaywood Mfg*., 299 NLRB 697 (1990).

Section 8(a)(3) of the act makes it unlawful for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. 158(a)(3). Although in this case the factual underpinnings for the 8(a)(3) violation are the same as the 8(a)(1) violation. 8(a)(3)

[3] Ken Cowden on August 28, 2013, filed a Petition to Decertify the Union claiming that a substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative. (GC Br. Appendix A).

differs in that it requires (1) proof of discrimination and (2) proof of motivation to discourage union activities. *Midwest Television*, 343 NLRB 748 (2004).

I find that discrimination is clearly established as both DeAmicis and Wedell who did not resign were not allowed to work while other employees who submitted their resignation forms were in fact allowed to work.

The second element is met applying the principles enunciated in *NLRB. v. Great Dane Trailers, Inc.,* 388 U.S. 26, 33–34, 87 S. Ct. 1792, 1797–1798, 18 L. Ed. 2d 1027 (1967). In *Great Dane*, the court held that if the conduct is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive. The court reasoned that, "some conduct carries with it 'unavoidable consequences which the employer not only foresaw but which he must have intended' and thus bears 'its own indicia of intent.' *Id*. I find that Respondent's conditioning employment on Union resignation is "inherently destructive" of employees interests and carried with it 'its own indicia of intent." Stated differently, Respondent's unlawful motivation to discourage union activities is found in the very act of conditioning employment upon the purging or casting off of all union affiliation through resignation. Respondent's action unambiguously both penalizes and deters union activity.[4]

In *Great Dane,* the *C*ourt found that, "if the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away, justifying or characterizing its actions as something different than they appear on their face,' and if he fails, 'an unfair labor practice charge is made out.'" *Id*., at 228, 83 S.Ct. at 1145. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. *Id*., at 229, 83 S.Ct. at 1145.

I find that Respondent failed to meet its burden under *Great Dane*. Respondent concedes that it did ask employees to provide union resignation forms but asserts it only asked for them after they crossed the picket line. (Tr. 172, see also R. Br. at 43.). Respondent asserts that it did this for the "legitimate purpose" of assisting its payroll department with dues deduction. I am not persuaded by Respondent's claimed legitimate business justifications. Respondent's asserted legitimate purpose on its face did not apply to DeAmicis and Wedell who were both notified that, as a condition precedent to working, they first had to submit proof of resignation. In essence, the resignation forms were the "ticket" to work. Moreover, the evidence established that the contract expired and it is undisputed that the dues checkoff was no longer in effect. Therefore, there was no legitimate business need for the forms. Accordingly, I find that Respondent violated Section 8(a)(3) of the Act.

[4] Respondent, citing *Gaywood Mfg*., *supra*, at 699-670, concedes that conditioning work on resignation from the Union "could result in an inherently destructive act." (R. Br.p. 54 fn. 18.).

b) The Constructive Discharge and/or Termination of DeAmicis and Wedell

Alternatively, paragraph 8(a), (b), and (c) of the complaint allege that Respondent constructively failed and refused to assign work to DeAmicis and Wedell because they did not submit proof that they resigned from the Union and that such conduct caused the termination of DeAmicis and Wedell in violation of both 8(a)(3) and (1) of the Act. In order to establish constructive discharge two elements must be proved. That the employer's motivation was to discourage union membership and second that the employer established burdensome working conditions sufficient to cause the employee to resign. *Manufacturing Services*, 295 NLRB 254 (1989); *Algreco Sportswear Co*., 271 NLRB 499 (1984); *Crystal Princeton Refining Co*., 222 NLRB 1068 (1976). To establish an unlawful constructive discharge under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393 (1983), the General Counsel must prove, by a preponderance of the evidence, that the employee's protected activities were a substantial or motivating factor in the employer's decision to take action against them.

The first element is met as the action of requiring proof of resignation was on its face an effort to discourage union membership. As discussed above, there was no legitimate purpose for requesting the resignations except for the explicit purpose of discouraging union membership. Other proof of Respondent's motive can be inferred from the disparate treatment afforded those who submitted resignations and were allowed to work when compared to Wedell and DeAmicis who did not submit resignations and did not work. DeAmicis and Wedell were given the "Hobson's Choice" of either abandoning their Section 7 rights and working or not reporting for work. The General Counsel argued that by applying the "Hobson's Choice" theory recognized by the Board and discussed in *Intercon I*, 333 NLRB 223 (2001), a finding of constructive discharge was inescapable. I concur. The second element of constructive discharge is met in the "Hobson's Choice" line of cases if the employee is required to forgo and/or relinquish section 7 rights. See *Schwickert's of Rochester Inc*., 343 NLRB 1044 (2004). Conditioning employment on resignation from the Union on its face amounts to relinquishment of Section 7 rights and needs little discussion. Applying the reasoning and rationale set forth in *Intercon I* and *Schwickerts*, I find that both Wedell and DeAmicis were constructively discharged in violation of 8(a)(3) and (1) of the Act, effective the day the strike began July 29, 2013.

c) The Interrogation of DeAmicis

In determining whether an interrogation is coercive in violation of 8(a)(1), the Board applies a totality of the circumstances test which considers whether under all circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. *Bloom field Health Care Center*, 352 NLRB 252 (2008). Relevant factors for consideration were set forth by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and derived by the Board from standards articulated by the court in *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964). The underlying premise of the Board's holding in *Rossmore House* is that on many occasions interrogations can be completely lawful acts.

Rossmore House sets forth factors to consider in determining whether any particular interrogation falls outside the bounds of a lawful interrogation. The factors are as follows: (1) The background, i.e. is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e. how high was he in the company hierarchy? (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"? (5) Truthfulness of the reply. (6) Whether the interrogated employee was an open and active union supporter. See *McClain and Co.*, 358 NLRB No. 118 (2012), see also, *Camarco Loan Mfg. Plant,* 356 NLRB No. 143 (2011). *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004).

Rossmore House provides relevant factors for consideration however, the factors are not meant to be "mechanically applied" and it is not essential to a finding of a coercive interrogation that each and every element of *Rossmore* be met. The fundamental issue is whether the questioning would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 Rights. This is an objective standard and does not turn on whether the employee was actually intimidated. *Multi-Aid Service*, 331 NLRB 1126 (2000), enfd. 255 F.3d 363 (7th Cir. 2001).

Applying the totality of the circumstances test enunciated in *Rossmore House* to the facts of this case, I find that the interrogation of DeAmicis was coercive and violated Section 8(a)(1). At the outset, I find that what began as a perfectly lawful exercise of Respondent's authority with the questioning of a person riding a bicycle near the facility in the early hours of the morning crossed over into the realm of a coercive and unlawful interrogation.

A number of *Rossmore House* factors are present. The interrogation took place in the early morning hours and resembled a police questioning. Grove, the director of operations and human resources, a person high in the company hierarchy, was in a concealed position and revealed himself with a flashlight and began the questioning. Secondly, the nature of this questioning led to open employer discrimination in the form of conditioning of employment on his resignation from the Union and not allowing DeAmicis to even remain on the premises absent such resignation. When DeAmicis questioned the requirement of a resignation, he was asked directly if he attended the strike meeting on July 28, 2013. Grove had no valid purpose for seeking this information.[5]

I find given the totality of these circumstances surrounding the early morning encounter, Grove's inquiry into whether DeAmicis attended the strike meeting was a direct and coercive attempt to ascertain his union activities and sympathies and violated Section 8(a)(1) of the Act. See *Matros Automated Electrical Construction Co.*, 353 NLRB 569 (2008).

[5] Respondent contends in its answer that its inquiry was for "a legitimate need to ascertain manpower or business needs." I can discern no logical or legitimate business correlation between whether DeAmicis attended a strike meeting and Respondent's asserted "need to ascertain manpower."

d) The Collection of the Union Resignation Forms

Paragraph 7 of the complaint alleges that Respondent violated Section 8(a)(1) of the Act by collecting the union resignation forms. The evidence established that not only did it collect the forms themselves but it also collected the facsimile confirmation sheets. At the outset, it is worth noting that one of the threads that supports the assertions of Wedell and DeAmicis is the collection of the resignation forms. This supports their contention that they were told to provide proof of resignation. The collection of the forms not only supports their allegations but is in conformity with Cowden's corrected affidavit and her assertion that she also was told she needed to provide the form in order to work. Respondent was fully aware of the consistency of this evidence and for this reason concocted it's "dues collection" rationale. As discussed earlier, Respondent's asserted need for the resignation forms for "payroll" purposes was merely pretext calculated to break the logical chain of the evidence and to mask its violations of the Act.

The above discussion lays the groundwork for the resolution of whether the collection of the forms itself was coercive. It is important to note that the forms were not just looked at nor were they collected and placed in some communal mail bin at the facility. On the contrary, they were collected and forwarded to Grove, the director of operations and human resources, at his specific direction. (Tr. 172.). I find that Respondent's monitoring of employee resignation decisions by a high-level official and the pressure placed upon employees by requiring not only that they resign but show proof (with the fax confirmation sheets) of resignation was coercive and violated the Act. In *Landmark International Trucks, Inc*., 257 NLRB 1375 (1981), the Board reached the same conclusion under strikingly similar facts. In *Landmark,* like the present case, the Board held that Respondent had no valid reason to monitor and be informed of employee's resignation decisions and therefore its actions were coercive. Similar reasoning is applicable to this case.

ii) Respondent's Arguments Regarding Remedies

Respondent argued that if liability was found remedies should be limited. Respondent's position is predicated the notion that (1) the strike was unprotected and the Union prolonged the strike; (2) Rick Wedell acknowledged that he would not cross the picket line; and (3) Respondent's email of August 2, 2013, to Dante DeAmicis cured any harm he may have suffered.

a) The Strike was Protected by the Act

Regarding the assertion that the strike was unprotected Respondent relies upon the theory that binding arbitration, a permissive item of bargaining, was a reason for the strike and therefore the strike was premised upon an unlawful objective. The facts in this record simply do not support such a conclusion and to reach such would require the assumption of facts which do not appear in the record. In the first instance, Miranda directly denied that binding arbitration was a reason for the strike. (Tr. 39.). Secondly, Respondent relies upon a letter from members of the California legislature which was written on August 15, 2013, to "encourage" Paratransit Inc. to enter into binding arbitration. (R. Ex. 2.). The undisputed facts are that after this letter was received, Grove, on August 27, 2013, then sent a letter to Miranda inquiring of the Union's

position regarding ending the strike and 'what the expectation of binding arbitration" would be. (R. Exh. 3.). Miranda responded in a note outlining some alternative terms that might be workable from the Union's perspective.

What these facts show is that a third party (members of the California legislature) were concerned because the strike was impacting vulnerable members of the community and "encouraged" both sides to consider arbitration as a means of ending the strike. This triggered the discussion which included Grove's inquiry and Miranda's response. Unlike the facts of the cases cited by Respondent, this was not an objective of the strike but rather a suggested means for both to consider as a possible framework for ending the strike. It was merely an alternative for both parties to consider. A considered alternative is distinct and different from a strikes "purpose." Factually this case is dissimilar to *Nassau Insurance Co.,* 280 NLRB 878 (1986), cited by Respondent. It would frustrate the purposes of the Act if the *Nassau Insurance* line of cases were read to allow an employer (who has otherwise violated to Act) to relieve itself of liability by simply sending a letter and inviting discussion regarding arbitration as a possible mechanism to end the strike thereby automatically converting the strike into an "unprotected" strike" when the Union merely responds to the inquiry. Nor am I persuaded by Respondent's assertion that the time it took to undertake these discussions regarding alternatives to end the strike somehow unlawfully prolonged the strike. Also, as emphasized by General Counsel in their brief, neither DeAmicis nor Wedell were alleged to have been discharged because they engaged in a strike but because they didn't comply with the unlawful condition being placed upon their being allowed to work.

b) Rick Wedell Did Not Acknowledge That He Would Not Cross The Picket Line

A careful review of the record reveals that Respondent in order to support its argument regarding the limitation of remedies mischaracterizes Wedell's testimony. Despite Respondent's general assertions to the contrary, Wedell never "acknowledged that he would not have crossed the picket line." (R. Br. at 59.). What Wedell did say was that he was not sure about his union membership status as he was a member of Local 315. He also said he was unsure and "didn't know what to do" when presented with the choice of resigning from the Union. (Tr. 146.). I also find no legal support for the proposition (and Respondent cites none) that Wedell's remedies should be limited because after Respondent engaged in acts which were "inherently destructive" and he was given the "Hobson's Choice" of relinquishing his rights under the Act, he actively supported the strike. (Tr. 144.). Nor do I find persuasive Respondent's assertion that making Wedell whole for his losses would not "effectuate the policies of the Act." (R. Br. at 59.). On the contrary, I find that the opposite is true.

c) Respondent's Email of August 2, 2013, did not cure the Violations of the Act.

I also disagree with Respondent's contention that Grove's email to DeAmicis somehow relieves it of liability. What is evident from the facts of the case is that DeAmicis repeatedly sought clarification after being told of the requirement to resign and in one of his emails clearly stated, "I am not presently a Union member and . . . . I intend to cross the picket line during the current labor dispute." (GC Exh. 10 p. 2.). What is glaringly absent from his conversation with Gray and the subsequent August 2, 2013, email from Grove is a simple one sentence statement clarifying to him that he did not have to resign to in order to work. Had Gray or Grove

communicated this to DeAmicis, Respondent's argument might carry some weight but they didn't. A reasonable inference to be drawn from this evidence is that DeAmicis purposely wasn't told he could work without resigning because it would conflict with what other employees were being told and it would conflict with what appears to have been Respondent's underlying goal, that of discouraging union membership.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By conditioning work on resignation from the Union, constructively discharging Rick Wedell and Dante DeAmicis, unlawfully collecting union resignation forms, and by engaging in unlawful interrogation of employees Respondent violated the Section 8(a)(3), and (1) of the Act as alleged in the complaint.

Remedy

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

a) Respondent shall be required to reinstate and make DeAmicis and Wedell whole in all respects for all losses whatsoever resulting from Respondent's unlawful actions. Back pay shall be computed on a quarterly basis from the date of his discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). Respondent shall file a report with the Social Security Administration allocating back pay to the appropriate calendar quarters for both employees. The Company shall also compensate both DeAmicis and Wedell for the adverse tax consequences, if any, of receiving one or more lump-sum back pay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

b) Respondent will also be ordered to within 14 days from the date of this order expunge from its records all resignations that it collected pursuant to its unlawful practices. Respondent will be ordered to post appropriate notices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Order

The Respondent, Paratransit Services, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from engaging in the following conduct:

(a) Conditioning employment on resignation of the Union.

(b) Coercively interrogating employees and collecting letters of resignation without any lawful purpose for doing so.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) I have found Respondent discriminatorily discharged Rick Wedell and Dante DeAmicis effective July 29, 2013, both shall be reinstated to their former positions if reinstatement has not already occurred.

(b) Make Rick Wedell and Dante DeAmicis whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Rick Wedell and Dante DeAmicis and within 3 days thereafter notify them in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against them and/or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker or otherwise used against them in any way.

(d) Preserve and provide within 14 days at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days from the date of this order remove and expunge from its files and records all of the Union resignation letters (and facsimile confirmation sheets) that were referenced herein and collected in violation of the Act.

(e) Within 14 days after service by the Region, post at its facility in Lake County California copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 28, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 2014

Dickie Montemayor
Administrative Law Judge

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT condition employment on union resignation and/or proof of such.

WE WILL NOT discharge you for refusing to provide proof of union resignation.

WE WILL NOT unlawfully collect union resignation forms or coercively interrogate you.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

YOU HAVE THE RIGHT to work without being interrogated or being required to resign from the Union.

WE WILL make Dante DeAmicis and Rick Wedell whole for any loss of earnings and other benefits suffered as a result of their unlawful constructive discharge.

WE WILL remove from our files any reference to the unlawful discharges of Dante DeAmicis and Rick Wedell and notify them in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against them or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker or otherwise used against him in any way.

WE WILL remove from our files any and all of the letters of resignations (along with the facsimile cover sheets) that we unlawfully collected from employees.

PARATRANSIT SERVICES, INC.

_____

(Employer)

Dated: _____ **By:** _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

NLRB Region 20
901 Market Street, Suite 400
San Francisco, CA 94103

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-110937 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5130.